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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 418.

AMERICAN WATER SOFTENER COMPANY, APPELLANT,

vs.

J D. LANKFORD, A. D. KENNEDY, W. F. BARBER, AND JOHN J. GERLACH, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

FILED MARCH 27, 1914.

(24,129)

(24,129)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 418.

AMERICAN WATER SOFTENER COMPANY, APPELLANT,

vs.

J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER, AND JOHN J. GERLACH, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1914.

a *Transcript of Pleas and Proceedings Before the Honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma, Presiding in the Following Entitled Cause.*

Equity. No. 1997.

AMERICAN WATER SOFTENER COMPANY, Complainant,

vs.

J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER, and JOHN J. Gerlach, Composing the State Banking Board, and The State of Oklahoma and Farmers & Merchants Bank of Sapulpa, Oklahoma, a Corporation, Defendants.

AMERICAN WATER SOFTENER COMPANY, Appellant,

vs.

J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER, and JOHN J. Gerlach, Composing the State Banking Board, and The State of Oklahoma and Farmers & Merchants Bank of Sapulpa, Oklahoma, a Corporation, Appellees.

1 In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997. Equity.

AMERICAN WATER SOFTENER COMPANY, Complainant,

vs.

J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER, and JOHN J. Gerlach, Composing the State Banking Board, and The State of Oklahoma and Farmers & Merchants Bank of Sapulpa, Oklahoma, a Corporation, Defendants.

Bill in Equity.

To the Honorable Judges of the District Court of the United States for the Eastern District of Oklahoma:

The complainant, complaining of the defendants above named says:

First Cause of Action.

That the complainant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey with its place of business at Philadelphia, and is a resident and citizen of the State of Pennsylvania, That the defendants, J. D. Lankford and A. D. Kennedy, are residents and citizens of the State of Oklahoma and of the Eastern Judicial District of said State; that the defendants W. F. Barber and John J. Gerlach, are residents and

citizens of the State of Oklahoma and of the Western Judicial District of said State; that the said J. D. Lankford is the Bank Commissioner of the State of Oklahoma; that the defendants, J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach compose the State Banking Board of the State of Oklahoma; and that said J. D. Lankford is chairman of said Board. That the defendant, Farmers & Merchants Bank of Sapulpa, Oklahoma, is a banking corporation organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal banking office
2 and place of business in the City of Sapulpa, Oklahoma, in the Eastern Judicial District of the State of Oklahoma, and is a citizen of said Eastern District. That the matter in controversy in this action exceeds, exclusive of interest and costs, the sum and value of Three Thousand ($3,000.00) Dollars.

That on and prior to June 8, 1912, the defendant corporation, Farmers and Merchants Bank of Sapulpa, Oklahoma, conducted a state bank under and pursuant to the laws of the State of Oklahoma governing state banks, in the City of Sapulpa, Oklahoma. That on said June 8, 1912, the American Water Softener Company, a New Jersey corporation, of Philadelphia, Pennsylvania, deposited in said bank the sum of Thirty-three Hundred Thirty-seven and 50/100 ($3337.50) Dollars, and said Bank thereupon issued and delivered to said American Water Softener Company a certificate of deposit in the usual and regular form, and in words and figures as follows, to-wit:

SAPULPA, OKLA., June 8, 1912. No. 1014.

This is to certify that American Water Softener Company has deposited with Farmers and Merchants Bank, State and County Depository.—Deposits Guaranteed—$3337.50—Thirty three Hundred Thirty-seven and 50/100 Dollars payable 60 days after date with interest at the rate of 3 per cent per annum if left 3 mo. or 4% per annum if left 6 mo.

(Not over Four Thousand $4,000$

B. B. BURNETT, *Cashier.*

Certificate of Deposit.
Not subject to check."

The said Farmers & Merchants Bank of Sapulpa, at the time the said sum was deposited with it, was subject to the provisions of the Banking Laws of the State of Oklahoma by virtue of which, in the event of its failure, depositors are entitled to be paid in full out of the funds of said Bank, or out of the Depositors' Guaranty Fund, or out of additional assessments, or otherwise as provided by law and the moneys so deposited by the said American Water Softener
3 Company in the said Farmers & Merchants Bank of Sapulpa were subject to the provisions of and entitled to the benefits of the laws of the State of Oklahoma providing for the guarantee of deposit-, on the payment thereof out of the Depositors' Guaranty Fund, or otherwise, as provided by said laws of the State of Oklahoma.

That said sum of $3,337.50 so deposited by said American Water Softener Company in said bank, and evidenced by said certificate of deposit, continued in and remained on deposit in said Bank until on or about September 10, 1912. That on said last named date the said Farmers & Merchants Bank of Sapulpa failed, and was closed and taken possession of by the defendant, J. D. Lankford, Bank Commissioner of the State of Oklahoma, and certain other persons who, together with the said Lankford at that time composed the Banking Board of the State of Oklahoma. That said Banking Board took possession of the banking office, business and assets of said bank and retained possession of and conducted the same for several months, and until the personnel of said State Banking Board was changed by law and by the appointment of the defendants, A. D. Kennedy, W. F. Barber and John J. Gerlach, and that said banking office, business and assets of said bank are now under the control and in the possession of the said J. F. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing the present State *of* Banking Board of the State of Oklahoma, and who as such Banking Board are charged by law with the duty of administering and closing up the business and affairs of said bank.

That prior to the institution of this suit the complainant presented said certificate of deposit to the State Banking Board and demanded payment of said certificate out of the fund created by the laws of the State of Oklahoma for the payment of the deposits in failed state banks and known as the Depositors' Guaranty Fund of the State of Oklahoma, or if said fund was not sufficient to pay
4 the said certificate of deposit that then the said State Banking Board issued to the complainant a certificate of indebtedness for said deposit and certificate of deposit, as provided by the laws of the State of Oklahoma, said certificate of indebtedness to bear interest at six percent. That said State Banking Board refused and still refuses to pay the certificate of deposit of the complainant or to issue to the complainant a certificate of indebtedness; that said certificate of deposit is still held and owned by this complainant, that said deposit of $3,337.50 is now due and owing the complainant, together with four per cent interest thereon from June 8, 1912, and the complainant is entitled, under the laws of the State of Oklahoma, to payment of said deposit, or to a certificate of indebtedness for the same, if the State Guaranty Fund be insufficient to pay said deposit, and that it is the duty of said State Banking Board, under the laws of the State of Oklahoma, to pay to this complainant the amount of said deposit out of the said State Guaranty Fund, or, if said fund be insufficient, to issue and deliver to this complainant a certificate of indebtedness for the amount of said deposit, bearing interest at six per cent.

In consideration whereof, for as much as your complainant is without remedy in the premises by the strict rules of common law, and is relievable only in a court of equity, where matters of this nature are cognizable, your complainant prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the complainant is the owner of, and entitled to

the said deposit and certificate of deposit, and interest thereon, and is entitled to have the same paid out of the depositors' guaranty fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board of the State of Oklahoma, composed of said J. D. Lankford, A. D. Kennedy, W. F. Barber
5 and John J. Gerlach, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon out of the depositors' Guaranty fund; and if there are not sufficient funds in said depositors' guaranty fund available therefor, that the said Banking Board be ordered, commanded and required to issue to the complainant a certificate of indebtedness, for the amount of such certificate of deposit, bearing six per cent interest as provided by Section 3, of Article 2, Chapter 5, Session Laws of Oklahoma, 1909, as amended by Section 3, Chapter 31, Session Laws of Oklahoma, 1911, and by Section 6 of the Amendment of 1913 to said Banking Law; and that the said J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing said State Banking Board, be ordered, commanded and required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such depositors' guaranty fund, and paying said deposit and said certificate of indebtedness, and for such other and further relief as shall seem meet and agreeable in equity and good conscience.

Second Cause of Action.

That on and prior to June 8, 1912, the defendant corporation, Farmers & Merchants Bank of Sapulpa, Oklahoma, conducted a state bank under and pursuant to the laws of the State of Oklahoma governing state banks, in the City of Sapulpa, Oklahoma. That on said June 8, 1912, the American Water Softener Company, a New Jersey corporation, of Philadelphia, Pennsylvania, deposited in said Bank the sum of Thirty-three Hundred Thirty-seven and 50/100 ($3337.50) Dollars, and said bank thereupon issued and delivered to said American Water Softener Company a certificate of deposit in the usual and regular form, and in words and figures as follows, to wit:

6 SAPULPA, OKLA., June 8, 1912. No. 1015.

"This is to certify that American Water Softener Company has deposited with Farmers & Merchants Bank, State and County Depository—Deposits Guaranteed—$3337.50 Thirty three hundred thirty seven and 50/100 Dollars Payable 3 months after date on the return of this Certificate properly endorsed with interest at the rate of 3 per cent per annum if left 3 mo. or 4% per annum if left 6 mo.

Not over four thousand 4000
Certificate of Deposit
Not subject to check

B. B. BURNETT, *Cashier.*"

The said Farmers & Merchants Bank of Sapulpa, at the time the said sum was deposit- with it, was subject to the provisions of the Banking Laws of the State of Oklahoma by virtue of which, in the event of failure, depositors are entitled to be paid in full out of the funds of said Bank, or out of the Depositors' Guaranty Fund, or out of additional assessments, or otherwise, as provided by law and the moneys so deposited by the said American Water Softener Company in the said Farmers & Merchants Bank of Sapulpa were subject to the provisions of and entitled to the benefits of the laws of the State of Oklahoma providing for the guarantee of deposit-, on the payment thereof out of the Depositors' Guaranty Fund, or otherwise, as provided by said laws of the State of Oklahoma.

That said sum of $3337.50 so deposited by said American Water Softener Company in said Bank, and evidenced by said certificate of deposit, continued in and remained on deposit in said Bank until on or about September 10, 1912. That on said last named date the said Farmers & Merchants Bank of Sapulpa failed, and was closed and taken possession of by the defendant, J. D. Lankford, Bank Commissioner of the State of Oklahoma, and certain other persons who, together with the said Lankford at that time composed
7 the Banking Board of the State of Oklahoma. That said Banking Board took possession of the banking office, business and assets of said bank and retained possession of and conducted the same for several months, and until the personnel of said State Banking Board was changed by law and by the appointment of the defendants, A. D. Kennedy, W. F. Barber and John J. Gerlach, and that said banking office, business and assets of said bank are now under the control and in the possession of the said J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing the present State Banking Board of the State of Oklahoma who as such Banking Board are changed by law with the duty of administering and clearing up the business and affairs of said bank.

That prior to the institution of this suit the complainant presented said certificate of deposit to the State Banking Board and demanded payment of said certificate out of the funds created by the laws of the State of Oklahoma for the payment of the deposits in failed state banks and known as the Depositors Guaranty Fund of the State of Oklahoma, or if said fund was not sufficient to pay the said certificate of deposit that then the said State Banking Board issue to the complainant a certificate of indebtedness for said deposit and certificate of deposit, as provided by the laws of the State of Oklahoma, said certificate of indebtedness to bear interest at six per cent. That said State Banking Board refused and still refuses to pay the certificate of deposit of the complainant or to issue to the complainant a certificate of indebtedness; that said certificate of deposit is still held and owned by this complainant; that said deposit of $3337.50 is now due and owing the complainant, together with four per cent interest thereon from June 8, 1912, and that complainant is entitled under the laws of the State of Oklahoma, to payment of said deposit, or to a certificate of indebtedness for the same, if the State Guaranty Fund be insufficient to pay said deposit, and that
8 it is the duty of the said State Banking Board, under the laws of the State of Oklahoma, to pay to this complainant the

amount of said deposit out of said State Guaranty Fund, or, if said fund be insufficient, to issue and deliver to this complainant a certificate of indebtedness for the amount of said deposit, bearing interest at six per cent.

In consideration whereof, for as much as your complainant is without remedy in the premises by the strict rules of common law, and is relievable only in a court of equity, where matters of this nature are cognizable, your complainant prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the complainant is the owner of, and entitled to the said deposit and certificate of deposit, and interest thereon, and is entitled to have the same paid out of the depositors' guaranty fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board of the State of Oklahoma, composed of said J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, defendants herein, and that said J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon out of the depositors' guaranty fund; and, if there are not sufficient funds in said depositors' guaranty fund available therefor, that the said Banking Board be ordered, commanded and required to issue to the complainant a certificate of indebtedness, for the amount of such certificate of deposit, bearing six per cent interest as provided by Section 3, of Article 2, Chapter 5, Session Laws of Oklahoma, 1909, as amended by Section 3, of Chapter 31, Session Laws of Oklahoma, 1911, and by Section 6 of the Amendment of
9 1913 to said Banking Law; and that the said J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing the said State Banking Board, be ordered, commanded and required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such depositors' guaranty fund, and paying said deposit and said certificate of indebtedness, and for such other and further relief as shall seem meet and agreeable in equity and good conscience.

AMERICAN WATER SOFTENER CO.,
[Corporation Seal.] ARTHUR S. GARRETT, *Pres.*

Attest:
A. C. TOMLINSON,
Ass't Sec'y.

COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

Arthur S. Garrett, being duly affirmed according to law, doth depose and say that he is President of the American Water Softener Company, the above named complainant, and that the facts set forth in the foregoing statement of complaint are true.

ARTHUR S. GARRETT.

Affirmed to & Subscribed before me this 9th day of July, A. D. 1913.

[SEAL.] HELEN I. KAUFFMAN,
Notary Public.

Commission Expires Feb. 9th, 1917.

Endorsed: Filed Jul- 17, 1913. R. P. Harrison, Clerk United States District Court, Eastern District, Oklahoma.

10 And thereafter, to-wit, on the 14th day of August, A. D. 1913, the defendant filed Motion to Dismiss the Bill of Complaint, which is in words and figures as follows:

11 In the United States District Court for the Eastern District of Oklahoma.

No. 1997. E.

AMERICAN WATER SOFTENER COMPANY, Plaintiff,
vs.
J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER, and JOHN J. GERLACH, Composing the State Banking Board, Defendants.

Motion to Dismiss the Bill of Complaint.

And now come the defendants, J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, Composing the State Banking Board, by Chas. West, Attorney General of the State of Oklahoma, and move the court to dismiss the plaintiff's bill of Complaint for the following reason:

That the court has no jurisdiction of the subject matter of the action or the persons of the defendants, said suit is one against the State of Oklahoma, without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

Wherefore, defendants pray judgment whether they shall further answer, and that they be dismissed with their costs.

CHAS. WEST,
Attorney General.
JOS. L. HULL,
Assistant Attorney General.

Endorsed: Filed Aug. 14, 1913, R. P. Harrison, Clerk U. S. Court for the Eastern District of Oklahoma.

11*a* And thereafterwards, to-wit, on the 26th day of December, A. D. 1913, the same being one of the days of a special session of the United States District Court for the Eastern District of Oklahoma, sitting at Muskogee, Oklahoma, the following order was made and entered in this cause:

In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997.

AMERICAN WATER SOFTENER CO., Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

Order Sustaining Motion to Dismiss.

Now on this 26th day of December, 1913, on consideration of defendants' motion to dismiss the bill in this case, which motion was heretofore argued and submitted upon briefs of counsel, the court for reasons stated in an opinion this day filed in cause No. 1475, Farish v. State Banking Board, finds that this is in effect a suit against the State of Oklahoma.

It is therefore ordered that said motion to dismiss be sustained and that this cause be and it is hereby dismissed. To which action of the court the plaintiff asks and is allowed its exceptions.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Dec. 26, 1913, R. P. Harrison, Clerk U. S. District Court, Eastern District Oklahoma.

12 And thereafterwards, to-wit, on the 27th day of February, A. D. 1914, the Complainant filed its Petition for allowance of Appeal, Assignment of Errors and Cost Bond, which Petition for Allowance of Appeal was allowed by the Court. Said Petition for Allowance of Appeal, Assignment of Errors, Cost Bond and Order Allowing Appeal are in words and figures as follows:

13 In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997. E.

AMERICAN WATER SOFTENER COMPANY, Complainant,
v.
J. D. LANKFORD et al., Defendants.

Petition for Allowance of Appeal Direct to the Supreme Court of the United States on the Question of Jurisdiction.

Your petitioner, American Water Softener Company, respectfully represents that there is manifest error committed, to the injury of your petitioner, by the final decree pronounced in this case on the 26th day of December, 1913, in and by which final decree this court refused jurisdiction of the cause set forth in the petitioner's bill of

Complaint, on the ground that this was in effect a suit against the State of Oklahoma, of which suit this court had no jurisdiction by reason of the provisions of the Eleventh Amendment to the Constitution of the United States, and on said ground the court on said December 26, 1913, entered a final decree dismissing this cause for want of jurisdiction.

Wherefore, your petitioner, American Water Softener Company, considering itself aggrieved, prays an order granting an appeal from said final decree denying jurisdiction, as aforesaid, to the Supreme Court of the United States, as authorized by Section 238 of the Act of Congress of the United States, approved March 3, 1911, and prays this Honorable Court that said appeal be allowed, and that a transcript of so much of the record, proceedings and papers upon which said decree was made as may be necessary to present said question of jurisdiction on appeal, duly authen-icated, may
14 be sent to the Supreme Court of the United States.

Your petitioner herewith files and offers its bond in the penal sum of Five Hundred ($500.00) Dollars, and asks that the same be approved and that the appeal be allowed.

L. J. ROACH,
Attorney for Complainant.

Order Allowing Appeal.

The Complainant's bill having been dismissed by decree of this court, on the sole ground that the court had no jurisdiction of the cause; and the complainant having prayed an appeal to the Supreme Court of the United States on said question of jurisdiction, it is now ordered in open court that the appeal be allowed on the question only, from the final order and decree dismissing said suit for want of jurisdiction. And it is further ordered that so much of the record and proceedings and papers upon which said order and decree was made as are necessary to present this question of jurisdiction, and no more, be included in the record on appeal.

RALPH E. CAMPBELL,
Judge of the District Court of the United States for the Eastern District of Oklahoma.

Endorsed: Filed Feb. 27, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District Oklahoma.

15 In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997. E.

AMERICAN WATER SOFTENER COMPANY, Complainant,
vs.
J. D. LANKFORD et al., Defendants.

Assignment of Errors.

Now comes the above named appellant, American Water Softener Company, by L. J. Roach, its attorney, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The District Court of the United States for the Eastern District of Oklahoma, erred in holding and deciding that the said Court had no jurisdiction to try and determine this suit, and in rendering its decree dismissing the bill herein on that ground.

II.

The said court erred in holding and deciding that this was in effect a suit against the State of Oklahoma.

III.

The said court erred in holding and deciding that a suit against the individuals composing the State Banking Board of the State of Oklahoma, and against a defunct state bank of said state, to recover upon certificates of deposit issued to the complainant by the said bank before it became defunct, and seeking to compel the said individuals composing the said state banking board to pay said certificates of deposit out of the fund known as the Depositors' Guaranty Fund of the State of Oklahoma, or to issue certifi-
16 cates of indebtedness to the complainant for the amount of its certificates of deposit issued by said now defunct bank, was, under the laws of the State of Oklahoma, with reference to state banks, with reference to said state banking board, and with reference to said Depositors' Guaranty Fund, in effect a suit against the State of Oklahoma.

Wherefore, the appellant, American Water Softener Company, prays that the decree and order of the said District Court of the United States for the Eastern District of Oklahoma, appealed from herein, be reversed.

L. J. ROACH,
Attorney for Appellant.

Endorsed: Filed Feb. 27, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

17 In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997. E.

AMERICAN WATER SOFTENER COMPANY, Complainant,

v.

J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER, and JOHN J. Gerlach, Composing the State Banking Board of the State of Oklahoma, and Farmers & Merchants Bank of Sapulpa, Oklahoma, a Corporation, Defendants.

Bond on Appeal.

Know all men by these presents:

That we, American Water Softener Company as principal, and Equitable Surety Company, of St. Louis, Missouri, a corporation, duly authorized and qualified to do business and execute bonds in the State of Oklahoma, as surety, are held and firmly bound unto the above named J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing the State Banking Board of the State of Oklahoma, and Farmers & Merchants Bank, of Sapulpa, Oklahoma, a corporation, in the penal sum of Five Hundred ($500.00) Dollars, to be paid to the said Defendants; for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of February, 1914.

Whereas, the above named American Water Softener Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree and order rendered in the above entitled cause by the Judge of the District Court of the United States for the Eastern District of Oklahoma.

18 Now, therefore, the condition of this bond is such that if the above named American Water Softener Company shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void; and otherwise the same shall be and remain in full force and effect.

AMERICAN WATER SOFTENER COMPANY, *A CORPORATION*,
By L. J. ROACH, *Attorney for Appellant*.

[SEAL.] EQUITABLE SURETY COMPANY,
By E. J. PHELPS, *Attorney in Fact*.

The foregoing bond approved this 27th day of February, 1914.

RALPH E. CAMPBELL,
Judge of the United States District Court for the Eastern District of Oklahoma.

Endorsed: Filed Feb. 27, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District Oklahoma.

19 In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997. E.

AMERICAN WATER SOFTENER COMPANY, Complainant,
v.
J. D. LANKFORD et al., Defendants.

Præcipe for Transcript of Record.

To the Clerk of the United States District Court for the Eastern District of Oklahoma:

You will please incorporate into the transcript of the record on the appeal of the above cause to the Supreme Court of the United States the following portions of the record.

1. The citation to be issued herein requiring the defendants to appear in the Supreme Court of the United States on this appeal, and proof of service thereof.
2. The original bill of Complaint.
3. The Motion of the Defendants to dismiss said bill of complaint.
4. The order sustaining said motion to dismiss and dismissing said bill.
5. The petition for appeal.
6. The order of the court allowing such appeal.
7. The undertaking on appeal.
8. The assignment of errors of the complainant upon this appeal and

20 9. This præcipe for transcript of record.

L. J. ROACH,
Attorney for Appellant.

Received copy and acknowledge service of the above præcipe this 28 day of February, 1914.

CHAS. WEST,
Attorney General for the State of Oklahoma;
JOS. L. HULL,
Assistant Attorney General for the State of Oklahoma,
Attorneys for Appellees.

Endorsed: Filed March 2, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District Oklahoma.

21 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above

and foregoing is a full, true and correct transcript of so much of the record in the case of American Water Softener Company vs. J. D. Lankford, et al., No. 1997, Equity as was ordered by præcipe of counsel herein to be prepared and authenticated, together with the original citation, as the same appears from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in the City of Muskogee, this 10th day of March 1914.

[Seal of the United States District Court, Eastern District of Oklahoma.]

R. P. HARRISON, *Clerk*,
By H. E. BOUDINOT, *Deputy*.

22 In the District Court of the United States for the Eastern District of Oklahoma.

No. 1997. E.

AMERICAN WATER SOFTENER COMPANY, Complainant,
v.
J. D. LANKFORD et al., Defendants.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To J. D. Lankford, A. D. Kennedy, W. F. Barber and John J. Gerlach, composing the State Banking Board of the State of Oklahoma, and Farmers & Merchants Bank of Sapulpa, Oklahoma, a Corporation:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia, on the 30th day of March, 1914, pursuant to an order allowing an appeal filed and entered in the clerk's office of the United States District Court for the Eastern District of Oklahoma from a final decree signed, filed and entered on the 26th day of December, 1913, in that certain suit, being in Equity No. 1997, wherein American Water Softener Company is complainant and appellant and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant, and dismissing said cause for want of jurisdiction, as in said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

23 Witness the Honorable Ralph E. Campbell, United States District Judge for the Eastern District of Oklahoma, this 27th day of February, 1914.

RALPH E. CAMPBELL,
Judge of the United States District Court for the Eastern District of Oklahoma.

Received copy and acknowledge service of the within citation this 28 day of February, 1914.

CHAS. WEST,
Attorney General for the State of Oklahoma;
JOS. L. HULL,
Assistant Attorney General for the State of Oklahoma,
Attorneys for Defendants.

24 [Endorsed:] No. 1997. E. In the District Court of the United States for the Eastern District of Oklahoma. American Water Softener Company, Complainant, vs. J. D. Lankford et al., Defendants. Citation on Appeal. L. J. Roach, Muskogee, Okla., Attorneys for Complainant.

Endorsed on cover: File No. 24,129. E. Oklahoma D. C. U. S. Term No. 418. American Water Softener Company, appellant, vs. J. D. Lankford, A. D. Kennedy, W. F. Barber, and John J. Gerlach, composing the State Banking Board of the State of Oklahoma, et al. Filed March 27, 1914. File No. 24,129.

No. 418

OCTOBER TERM, 1913

IN THE

Supreme Court of the United States

AMERICAN WATER SOFTENER CO., Appellant

vs.

J. P. LANKFORD et al., Appellees

Appeal from the District Court of the United States
for the Eastern District of Tennessee

MOTION TO ADVANCE

In the Supreme Court of the United States

October Term, 1913. No. 978

American Water Softener Company, Complainant

vs.

J. D. Lankford et al., *Defendants*

MOTION TO ADVANCE

Come now the parties to this cause and show to the Court that this is an action against the State Banking Board of Oklahoma to recover upon certificates of deposit issued by a former bank of Oklahoma, now defunct and in charge of said defendant Banking Board. That this cause is before the court on an appeal from an order of the United States District Court for the Eastern District of Oklahoma, dismissing this cause for want of jurisdiction, upon the ground that the cause is a suit against the State of Oklahoma, without its consent. That there is also pending in this Court cause No. 929, Lankford *et al.*, *vs.* Platte Iron Works. That said cause No. 929 is also a suit against the State of Oklahoma to recover upon similar certificates of deposit. That said cause No. 929 has been advanced upon the docket and placed upon the summary docket of this Court and has been assigned for hearing on Tuesday, October

13th, 1914. That the same questions of law are involved in and will be decisive of this cause as are involved in and will be decisive of said cause No. 929.

That the State Banking Board of Oklahoma is represented in both of the causes above named by the Attorney General of the State of Oklahoma; that the interests of the plaintiffs in said causes are identical; that the several attorneys for said plaintiffs desire to co-operate in the presentation to the Court of the legal questions involved in said causes.

WHEREFORE, The parties to this cause respectfully move the court to advance this cause upon the docket of the Court and to assign the same for hearing at the same time assigned for cause No. 929, to-wit, on Tuesday, October 13th, 1914.

L. J. ROACH
C. WILFRED CONARD
Attorneys for Appellants.

CHAS. WEST
Attorney General for the State of Oklahoma.

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Supreme Court of the United States

OCTOBER TERM, 1914

NO. 414

AMERICAN WATER SOFTENER CO., - Appellant,

vs.

J. D. LANKFORD, A. D. KENNEDY, W. P. BARBER AND JOHN J. GERLACH, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, ET AL. - - - - Appellees

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BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

[redacted]
[redacted]
[redacted]
Attorneys for Appellant.

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INDEX OF CASES

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NO. 418

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vs.

J. D. LANKFORD, A. D. KENNEDY, W. F. BARBER AND JOHN J. GERLACH, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, ET AL. - - - - - *Appellee*

BRIEF OF APPELLANT

1. STATEMENT OF THE CASE.

The facts in this case, coming up as they do, on Motion to Dismiss on the ground of jurisdiction, are not in dispute. As shown by the bill filed, the Appellant on June 8th, 1912, deposited in the Farmers and Merchants' Bank of Sapulpa, Oklahoma, two amounts of Three Thousand Three Hundred and Thirty-seven Dollars and Fifty Cents ($3337.50) each, and received from the Bank, as evidence thereof, two certificates of

deposit, in the amount of Three Thousand Three Hundred and Thirty-seven Dollars and Fifty Cents ($3337.50) each, drawn in the following form:

"Sapulpa, Okla., June 8, 1912.
No. 1014.

This is to certify that American Water Softner Company has deposited with Farmers and Merchants' Bank, State and County Depository,— Deposits Guaranteed, — $3337.50 — Thirty-three Hundred Thirty-seven and 50/100 Dollars payable 60 days after date with interest at the rate of 3 per cent per annum if left 3 mo. or 4% if left 6 mo.
(Not over Four Thousand $4,000.)

B. B. BURNETT, Cashier.

Certificate of Deposit
Not subject to check."

The Farmers and Merchants' Bank, at the time of said deposit, was a Banking Corporation duly incorporated under the laws of the State of Oklahoma, doing business in the City of Sapulpa, and was subject to the provisions of the laws of that State providing for the payments of depositors of failed banks from the State guarantee fund. The Appellant, as a depositor in said Bank, was entitled to the benefit of said laws guaranteeing the payment of deposits in insolvent banks.

The said two amounts of Three Thousand Three Hundred and Thirty-seven Dollars and Fifty Cents ($3337.50) each remained on deposit in said Bank until September 10th, 1912, when the Bank failed and was taken possession of by the State Banking Board, who conducted the Bank for some months, until a new Banking Board was appointed, which new Board took over and has since retained or administered all of the assets of said Bank.

The Appellant demanded from said State Banking Board the repayment of the said two amounts of Three

Thousand Three Hundred and Thirty-seven Dollars and Fifty Cents ($3337.50) each, and in default of funds in the hands of the Commission, demanded certificates of indebtedness, as provided by law, both of which were refused by the said State Banking Board, without any reason being assigned therefor.

This suit was thereupon brought to compel the State Banking Board to pay the amounts of said deposits, either out of the funds of the Bank in their possession or out of the State Guarantee Fund under their control, or, in default of both, to compel them to give to the Appellant the certificates of indebtedness provided for by law.

In answer to the suit the defendants, the State Banking Commission and the State Banking Board, without contesting the merits of the Appellant's demand, and in effect, as on a demurrer, admitting the facts claimed, interpose the sole defense that they are, in effect, the Sovereign State of Oklahoma, and as such immune from suit under the Eleventh Amendment of the United States Constitution.

The case came on for hearing in the United States District Court for the Eastern District of Oklahoma about the same time that the case of W. S. Farish vs. State Banking Board came on, involving similar questions, and the Court having filed an elaborate opinion in the Farish case (which is copied in full at page 26 hereof), holding that the suit was in effect against the State of Oklahoma, decided this case upon the same opinion, saying, "The Court, for reasons stated in an opinion this day filed in cause No. 1475, Farish v. State Banking Board, finds this is in effect a suit against the State of Oklahoma," and the motion to dismiss was sustained. (See record, page 8.)

The Farish case has been appealed to this Court October Term, 1914, No. 446.

2. ASSIGNMENT OF ERRORS.

Now comes the above-named appellant, American Water Softener Company, by L. J. Roach, its attorney, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The District Court of the United States for the Eastern District of Oklahoma erred in holding and deciding that the said Court had no jurisdiction to try and determine this suit, and in rendering its decree dismissing the bill herein on that ground.

II.

The said Court erred in holding and deciding that this was in effect a suit against the State of Oklahoma.

III.

The said Court erred in holding and deciding that a suit against the individuals composing the State Banking Board of the State of Oklahoma, and against a defunct state bank of said state, to recover upon certificates of deposit issued to the complainant by the said bank, before it became defunct, and seeking to compel the said individuals composing the said State Banking Board to pay said certificates of deposit out of the fund known as the Depositors' Guaranty Fund of the State of Oklahoma, or to issue certificates of indebtedness to the complainant for the amount of its certificates of deposit issued by the said now defunct bank, was, under the laws of the State of Oklahoma, with reference to state banks, with reference to said State Banking Board and with reference to said Depositors' Guaranty Fund, in effect a suit against the State of Oklahoma.

Wherefore, the appellant, American Water Softener Company, prays that the decree and order of the

said District Court of the United States for the Eastern District of Oklahoma, appealed from herein, be reversed. (See record, page 10.)

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3. ARGUMENT FOR APPELLANT.

The sole question involved, therefore, is whether the Appellant, whose money was in the failed Farmers and Merchants' Bank, as a deposit, at the time it and its assets were taken over by the State Banking Commission, has any remedy, in the Federal Court, when the Commission arbitrarily and without any reason therefor refuses to make payment thereof, as provided by the laws of Oklahoma.

THE LAW OF OKLAHOMA.

This question naturally leads to an inquiry as to the laws of the State of Oklahoma, under which immunity from suit is claimed by the defendants, for it may be conceded at once that if the suit is either in fact or in effect against the State in its Sovereign capacity, it is forbidden by the Eleventh Amendment.

The State-Guarantee-of-Bank-Deposit laws of Oklahoma and other States are framed for the purpose of assuring depositors in State banking institutions against ultimate loss of their moneys, and also for the purpose of quickly repaying to depositors the amounts of their claims, without the delay incident to winding up of the Bank's general business. In Oklahoma the system is provided in the Act of 1909, as amended by the Acts of 1911 and 1913, Harris & Day code, 84 to 88, the material parts of which are set forth in full on page 49 of this brief.

The plan is simple. Section 3 provides:

> "There is hereby levied an assessment against the capital stock of each and every bank and trust

company organized or existing under the laws of this State, for the purpose of creating a Depositors' Guaranty Fund, equal to five per centum of its average daily deposits, during its continuance in business as a banking corporation."

Provision is then made for the manner and time of payment and for emergency assessments where needed, and for the re-deposit of all assessments in the Bank making them until needed. It is then provided that in case of the insolvency of the Bank the Bank Commissioner shall take possession of its assets for liquidation, and shall pay all depositors in full, out of the funds of the Bank if there are sufficient, but if not, out of the Depositors' Guaranty Fund. Section 6 provides as follows:

"In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this Act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the Depositors' Guaranty Fund and from additional assessments, if required, as provided in Section 2, the amount necessary to make up the deficiency, and the State shall have for the benefit of the Depositors' Guaranty Fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company, and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the Depositors' Guaranty Fund."

In Section 8 it is provided:

"Section 8. The Bank Commissioner shall deliver to each bank or trust company that has complied with the provisions of this Act a certificate, stating that said bank or trust company has complied with the laws of this State for the

protection of bank depositors, and that safety to its depositors is guaranteed by the Depositors' Guaranty Fund of the State of Oklahoma. Such certificate shall be conspicuously displayed in its place of business, and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the Depositors' Guaranty Fund of the State of Oklahoma. Provided, however, that hereafter all banks operating under the guaranty law of the State of Oklahoma shall be permitted to advertise that their deposits are guaranteed by the Depositors' Guaranty Fund, but that no bank shall be permitted to advertise its deposits as guaranteed by the State of Oklahoma, and any bank or bank officer or employee who shall advertise their deposits as guaranteed by the State of Oklahoma shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding Five Hundred ($500.00) Dollars or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment, in the discretion of the trial court."

The Amendments make no material change in the general scheme of the Guaranty Law.

It thus appears that the various banks of the State are federated together, under the general control of the State Banking Commissioner and the State Banking Board, for the mutual guarantee of the depositors of any bank which shall fail. The State itself assumes no responsibility, handles no money and is entirely disinterested in the operation of the scheme, except in a general governmental sense. A bank may not even advertise that the State guarantees the deposit. The State Banking Board and the Banking Commissioner have no interest in it other than to see that the member banks fulfill their obligations one to another and to the mutual fund, called the "State Guaranty

Fund." Indeed, no "fund" is created as that term is usually understood. The Act (Section 3, pages 49, 55 hereof) provides, "There is hereby *levied* against the capital stock of each and every bank, etc." and this sum (last of Section 3) "shall be re-deposited with the bank from which it was paid, etc." Thus, it is not contemplated that a substantial sum shall at any time remain in the possession of the Banking Board, but that the various banks shall be subject to call at any time for such sums as may be needed to make up any deficiency in assets of a failed bank. To secure such payment, the member banks have given their certificates of deposit for the assessment "re-deposited" with them, as above, and besides, have given security for any payments which may be called for in the future. The assets of a failed bank are liquidated by the State Banking Commissioner, and the State ***retains a lien*** on all such assets (Sec. 6) for the benefit of the Guaranty Fund, to the extent of making good any amounts which may be withdrawn to pay depositors of the failed bank. In this way only does the State itself become interested in the assets of any of the member banks, and then only to the extent of returning to them the amounts which they have been compelled to pay into the State Guaranty Fund.

By the terms of the Act the duties of the Bank Commissioner and the State Banking Board are plain and mandatory, and admit of the exercise of no discretion in the matter of the payment of depositors. Sec. 6 provides, "In the event that the Bank Commissioner shall take possession of any bank, etc. (which he has done in this case) * * * the depositors of said bank * * * ***shall be paid in full,*** and when the cash available * * * is insufficient to discharge its obligations to depositors (which may or may not be in this case), the said Banking Board shall draw from the Depositors'

Guaranty Fund * * * the amount necessary to make up the deficiency, etc."

THE DUTIES OF DEFENDANTS ARE MINISTERIAL ONLY.

It is thus clear that under the laws of Oklahoma the plaintiff, as a depositor of the failed Farmers and Merchants' Bank, was entitled to be paid forthwith from the assets of the Bank or from the Guaranty Fund the amount of its deposit; or, if there was no funds therefor, it was entitled to receive warrants as provided by the statute, and the plain and only duty of these defendants under the law was to pay the money, or give the warrants to the plaintiff. They have no discretion in the matter, and their duty is purely ministerial.

This suit is therefore not against the State of Oklahoma to compel it to do anything which it should or could do, nor to take from it any money or property which it owns or has an interest in, but it is against the duly constituted officers of the State, charged with the performance of certain plain duties under the statutes of the State, to compel them to perform those duties. We have no quarrel or controversy with the State, and charge no default or omission on its part. We do charge that the officers of the State have neglected to perform a duty which under the laws of the State they are commanded to perform for our benefit, and that by reason of that failure we are injured. The State has done all that it can do on our behalf, but its servants have refused to do what the State has directed them to do, and it is to compel the performance of this duty that this suit is brought. The State has provided for the creation of a trust fund for our benefit, which the Banking Commissioners have refused to appropriate to our use as the State has commanded them to do.

The State has provided a means by which all of

the banks of the State shall contribute to the payment of the depositors of the failed Farmers and Merchants' Bank through the State Guaranty Fund, but the fund can only be made available to the Appellant through the action of the defendants, who for some reason have refused to act. The State law has directed them to act, but they have refused to do so. As said by Adams, C. J., in Huidekoper v. Hadley et al., 177 Fed. Rep. 1 (1910), in a similar case,

> "In so acting they did not stand for the State of Missouri and were not the State within the meaning of the Eleventh Amendment of the Constitution. A Sovereign State must be presumed to be willing that its laws shall be obeyed."

The defendants are violating the laws of the State, and are therefore answerable to the Court for their failure to do so.

THE SUABILITY OF THE STATE.

It is freely conceded that under the Eleventh Amendment a suit may not be maintained against a State, either in fact or in effect, without its consent. The cases to this effect are many and very clear.

Louisiana v. Jumel. 107 U. S. 711.
In Re Ayers. 123 U. S. 443.
Murray v. Wilson Distilling Co. 213 U. S. 151.

But this case is not nominally or in effect against the State of Oklahoma, nor is it to enforce any contract obligation or duty of the State, nor does it seek to recover any property of the State, or to compel any officer of the State to perform any governmental function. It seeks only to compel the officers of the State to obey the laws of the State, and to do what those laws plainly direct them to do.

It falls within the category of cases which hold that a suit against the officers of a State to restrain them from acting under an unconstitutional statute, or

to compel them to perform a plain duty demanded of them by the laws of the State, is not against the State itself, but is against the officers themselves as individuals, and hence not affected by the Eleventh Amendment.

Among the first class of cases, where jurisdiction has been entertained to restrain State officers from acting under void State statutes, are the following:

Board of Liquidation et al. v. McComb, 92 U. S. 531 (1875), where officers of the State of Louisiana were restrained from certain acts directed by the laws of the State, but prejudicial to the Plaintiff. Mr. Justice Bradley said (page 541):

> On this branch of the subject the numerous and well considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by mandamus or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a Court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. ***But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance;*** and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of any unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing

of the writ. An unconstitutional law will be treated by the courts as null and void.

This case was followed and the above excerpt quoted in Noble v. Union River Logging R. R. Co., 147 U. S. 165 (1892), where the Secretary of the Interior was restrained from making certain changes in the Plaintiff's maps, which he claimed a right to make, and again in Garfield, Secretary of the Interior, v. United States *ex. rel.* Goldsby, 211 U. S. 249 (1908), where a mandamus was issued to compel the Secretary of the Interior to erase certain notations upon his official record, improperly made by his predecessor.

Pennoyer v. McConaghy, 140 U. S. 1, where the Court entertained jurisdiction of a suit against State Land Commissioners to restrain them from selling lands claimed by the plaintiff, on the ground that the statute under which the Commissioners were acting was unconstitutional. Mr. Justice Lamar said:

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, ***or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty—purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State.***"

In re Young, 209 U. S. 123 (1907), the Court after elaborate consideration decided that an injunction might be issued in the Federal Court, restraining the Attorney

General of a State from proceeding upon certain unconstitutional statutes of the State.

Among the second class of cases are those similar to the case at Bar, where the Federal Courts have always entertained jurisdiction to compel State officers to perform a duty plainly imposed upon them by the State law, but which they willfully refuse or neglect to perform, to the prejudice or injury of the plaintiff. As was said in re Young, 209 U. S. 123 (1907):

> "(The Court) can only direct affirmative action where the officer having some duty to perform, not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. ***In that case, the Court can direct the defendant to perform this purely ministerial duty.***"

In Roulston v. Missouri Fund Commissioners, 120 U. S. 390 (1886).

The State of Missouri passed an act directing that whenever certain Trustees of the Hannibal & St. Joseph R. R. "should pay into the treasury of the State" certain moneys therein mentioned, the Governor should assign certain liens held by the State. The moneys were paid into the State treasury as directed, but the Governor refused to transfer the liens, whereupon this suit was brought to compel him to do so. The Governor and Commissioners defended on the ground, among others, that the suit was in fact against the State. The Court decided otherwise, saying, by Waite, C. J.:

> "It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and Louisiana v. Jumel, 107 U. S. 711, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. ***Here the suit is to get a***

state officer to do what a statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the Court, and the suit is in equity, it may be retained so as to determine what the trustees must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for."

In Graham v. Folsom, 200 U. S. 248 (1905).

The Township of Ninety-six, S. C., having created certain bonds, was afterward by amendment to the State constitution destroyed, and the territory thereof comprised in the County Greenwood. The interest on the bonds not having been paid, the District Court made a decree directing the officers of Greenwood County to levy taxes to pay the interest, which decree was affirmed in the Supreme Court. The contention that the suit was, in effect, against the State was not sustained.

Morrill v. American Reserve Bond Co., 151 Fed. 305 (C. C. Missouri, Sanborn, C. J., 1907).

Pursuant to the laws of Missouri, a bond company deposited with the State Treasurer certain bonds as security for other bonds issued by the company. The company failed, and the Receiver appointed by the Court to wind up its affairs demanded the delivery of the bonds to him for distribution among those entitled. The State Treasurer refused to deliver the bonds,

whereupon this suit was brought, in equity, and was resisted on the ground, among others, that the suit was against the State, and could not be maintained because of the Eleventh Amendment. In sustaining jurisdiction, the Court said:

> "The enforcement of trusts is one of the immemorial heads of equity jurisprudence, and the nature of the suit, the diversity of citizenship, the amounts in controversy and the presence of the trust property within this district bring it far within the jurisdiction of this Court, sitting in equity, and no judgment or execution returned nulla bona thereon upon the claims of complainants was requisite to sustain it. Every *cestui que* trust is entitled to the aid of a Court of Equity to avail himself of the benefit of the trust, and the forbearance of the trustee may not prejudice him."
> Lechmere v. Carlisle, 3 P. Wms. 211, and other cases.
>
> "The statutes of the State of Missouri required the defendant corporations, as a condition of conducting their business in the State, to deposit the trust property in the hands of the State Treasurer to secure the payment of their bonds; and the deposits under consideration were made in compliance with this legislation. This is a suit to take these deposits from the possession of the Treasurer, to convert them into money for distribution among the *cestui que* trust to whom it belongs. The judicial power of the United States does not extend to suits by citizens against States, Amendments to the Constitution, Art. XI. Is this suit against the State of Missouri?
>
> "A State can act only through its agents. But not every suit against an officer of a State is a suit against the State itself. A suit against a State officer, which involves the pecuniary interest of a State, to restrain or direct the action of the officer in a matter intrusted to his official discretion, is a suit against the State itself, of which the national courts have no jurisdiction.

Board v. McComb, 92 U. S. 531, and cases cited.

"But a suit to enjoin or direct a State officer in the performance of an official act which requires the exercise of no discretion, and involves no pecuniary interest of the State, and no violation of a positive statute thereof indicative of its public policy, is not a suit against a State, and any qualified citizen of another State may maintain such a suit in a federal court. A suit of this nature may be maintained even when its determination involves the pecuniary interest of the State, if the act of the officer is purely ministerial.

Rolston v. Missouri Fund Commissioners, 120 U. S. 39, and cases cited.

"Such a suit may also be maintained to restrain official action in pursuance of an unconstitutional statute or without lawful authority, and to recover damages for official action of this nature.

Regan v. Trust Co., 154 U. S. 362, and cases cited."

In discussing Louisiana v. Jumel, 107 U. S. 711, where the suit was to compel an officer of the State to do an official act which was directly prohibited by statute, the Court said:

"It is not so in the case under consideration. The securities here in question are not the property of the State, and it has no interest in them. The entire beneficial ownership in them is in the complainants and in the other bondholders of the defendant corporations. If these securities are lost or destroyed, the loss will not fall on the State or on its officers in whose custody these securities are, and the bondholders will be entitled to no payment by the State from other sources of its revenue. * * * * * * * * * * * * * * *

"No case has been cited, none has been discovered in which the Supreme Court has ever held that a suit against an officer of a State was a suit against the State in which the State was not either pecuniarily interested, or the execution of some positive statute which evidenced its public policy

was not directly involved, so that the real party in interest as a defendant was the State, and was not the officer. Moreover, in the cases in the Supreme Court which have not been sustained because they were against a State, that court has again and again announced the rule which it declared in Board v. McComb, 92 U. S. 531, that suits against State officers, either to arrest or direct their official action in matters ministerial, in which the complainants have a pecuniary interest, and the State has none, are not suits against the State and are within the jurisdiction of the Federal Court.

In re Ayres, 123 U. S. 506, and cases cited.

"This is a suit by bondholders of these insolvent defendant corporations to foreclose the pledge which they made to secure the payment of the complainants' bonds, to enforce the trust imposed upon the treasurer of the State by their deposit with him, and to liquidate the affairs of these corporations. No statute or law of the State prohibits the relief which the complainants seek. Neither the State nor the State Treasurer has any interest in the trust property or in the event of this proceeding. No disposition of it can entail either loss or gain upon the State or upon any of its officers. The only parties to it who have any right to or interest in the suit itself or in the trust property which is its subject are the defendant corporation and its creditors (authorities cited). It is not, therefore, a suit against the State and it falls far without the ban of Article XI of the Amendments to the Constitution (authorities cited.)"

Huidekoper v. Hadley, et al., 177 Fed. Rep. 1. (U. S. C. C. A. 8th Circuit, Adams C. J. 1910.)

The Board of Tax Equalization of the State of Missouri were by statute required to assess all property in the County at its actual cash value. Notwithstanding this duty, the Board, contrary to its duty, and against the protest of the Petitioner, assessed the property in Macon County at 1-3 of its real value, whereby

there was not sufficient money raised from the taxes in that county to pay the amount of a judgment owned by the Petitioner against the County. This was a petition for a Mandamus to the Board of Equalization to compel them to assess the property in Macon County at its full value, as required by law, and was resisted by the Respondents on the ground, among others, that it was a suit against the State of Missouri within the Eleventh Amendment to the Federal Constitution. In sustaining the jurisdiction of the Court, Adams, C. J., used the following language, peculiarly applicable to the case at bar:

> "This brief epitome of the legislation clearly discloses that the policy of the State requires property to be assessed on the basis of its true value in money, and that a duty is cast upon the State Board to equalize the property among the several counties of the State on that basis. Without now discussing the exact nature of that duty, its extent, or its limitations, it is sufficient for our present purpose to observe that it is an imperative duty imposed by the law of the State. A majority of its members, constituting a working quorum, refused to permit the Board to perform that duty, and compelled it to decline to do so. In so acting they did not stand for the State of Missouri and were not the State within the meaning of the Eleventh Amendment of the Constitution. A Sovereign State must be presented to be willing that its laws shall be obeyed. ***Through its laws it spoke to its servants and commanded them to do something. Certainly those servants, by their act of disobedience do not represent or stand for the State. This suit, therefore, instead of being against the State, is against its servants to compel them to do a duty which, by accepting office, they agreed to perform.***"

And in closing the opinion he said:

> "As it is, however, the Petition, to the averments of which we are necessarily confined, makes it appear that the relator's judgments against Ma-

con County, which a just regard for civil rights requires shall be paid, are rendered practically worthless by a failure to discharge a duty imposed by law upon the respondents. For such a breach of duty there ought to be a remedy."

Even the cases which have held most strongly that a suit may not be maintained against a State without its consent, have recognized the rule that a State officer, charged with the performance of a plain duty in which another is interested, may be compelled to act even though in so doing he will be performing an apparent or actual official function.

In Louisiana v. Jumel, 107 U. S. 711 (1882).

Where suit was brought against State officers to compel them to pay certain bonds, the Court held it was, in fact, against the State itself, and so could not be maintained, but Mr. Chief Justice Waite clearly inferred that in a case like the case at bar, the decision would have been different, He said:

> "The relators do not occupy the position of creditors of the State demanding payment from an executive *officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty.*"

Cunningham v. Macon & Brunswick R. R. Co. 109 U. S. 446 (1883).

Mr. Justice Miller, in classifying the cases where a suit against an officer of a State has been held, not against the State itself, said:

> "The third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, *but in the performance of which one or more indi-*

> *viduals have a distinct interest capable of enforcement by judicial process."*

In re Ayers, 123 U. S. 443 (1887).

Suit against an officer of the State was held to be against the State itself and hence within the Eleventh Amendment, but in distinguishing it from the case of Board of Liquidation v. McComb, 92 U. S. 531, Mr. Justice Matthews said (506):

> "But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, *nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."*

In Smith v. Reeves. 178 U. S. 436 (1899).

The suit was against the treasurer of the State of California to recover money paid as taxes. In pointing out that the Court had no jurisdiction, Mr. Justice Harlan observed that the suit was not "to recover specific moneys in the hands of the State Treasurer, nor to compel him to perform a plain ministerial duty."

In all of these cases we submit that the Court has made it very plain that obligations such as are imposed upon the defendants in this case are not beyond the reach of the Federal Courts.

The Court below in deciding the case of Farish v. State Banking Board, U. S. Supreme Court, October Term, 1914, No. 446 (see page 26 hereof) on the authority of which the case at bar was decided, relied to a very great extent on the authority of Murray v. Wilson Distilling Co., 213 U. S. 151, where it was held

that a suit against the South Carolina Dispensary Board was in fact a suit against the State and, therefore, prohibited by the Eleventh Amendment. But the decision of that case was on the substantial ground that the liquor in question was bought by the State itself, and that the defendants were merely agents of the State through whom the business was transacted. The State was directly and the only party really interested in the result of the suit, and the defendants did not, as in the case at Bar, refuse to perform a duty directly imposed upon them by statute.

The proposition of the learned Court below that the State Guaranty Fund was in fact the property of the State and in the custody of the defendants as representing the State is also untenable, as already shown. The statute nowhere vests the fund in the State, or in the Commissioners. It is at no time in the State Treasury, and the State has absolutely no control over it. The Commissioners themselves have no control over it beyond the power, in the event of a shortage appearing in the assets of any failed bank, to draw from the fund still lying in the member banks, to make up the shortage. The ultimate title of the fund is in the member banks and the Commissioners are merely ministerial officers appointed by the State to supervise its disposition. If it is not this, then the State Guaranty Fund is a trust fund under the control of the Commissioners as Trustees, who are, as a matter of course, answerable to a Court of Equity for the proper administration of the Trust.

This phase of the case presents a situation similar to that in Regan v. Farmers' Loan & Trust Co., 154 U. S. 362 (1893), where the Court sustained jurisdiction of a suit against the Railroad Commissioners of the State of Texas. In answering the argument that the suit was, in fact, against the State of Texas, and

hence contrary to the Eleventh Amendment, Mr. Justice Brewer said (390):

> "Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional and that the action of State officers under a constitutional statute is not subject to challenge in the Federal Court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state san have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws, but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of Courts, State and Federal, is in restraining the collection of taxes, illegal in whole or in part."

If the contention of the Banking Commissioners is to prevail, the whole State Guaranty law is a "snare

and a delusion." The State has provided for a fund to pay the depositors in all failed banks, and has called it the "Depositor's Guaranty Fund." The Banking Commissioner, by Sec. 3 of the act (see pages 49, 55, hereof) is authorized to give to all banks which comply with the act

> "a certificate, stating that said bank or trust company has complied with the laws of the State for the protection of bank depositors, and that safety to its depositors is guaranteed by the Depositor's Guaranty fund of the State of Oklahoma. Such certificate shall be conspicuously displayed in its place of business and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the Depositor's Guaranty Fund of the State of Oklahoma."

All of this is for the purpose of assuring those who deposit their money in the bank that in the event of failure there is a substantial source from which they will surely be paid. It is to impress upon depositors the idea of the soundness of the banking system of the State, guarded as it is by a combination of all the banks for mutual protection.

But all of this apparent security, or "protection," quickly vanishes when the depositor in such a failed bank finds all of its assets, including, perhaps, moneys he himself deposited a few minutes before the doors closed, taken over by the State Banking Commissioner and the State Banking Board, who, from caprice or otherwise, refuse to honor his claim as a depositor, and who are immune from suit because they stand for the State of Oklahoma. A right which cannot be judicially enforced is no right at all, and a "guaranty" which is enforceable only at the option of the guarantor is of no value as a protection.

We respectfully urge that such a conclusion is

absolutely foreign to the reasonable purpose of the act under consideration, of those who framed it and of the State which maintains it upon its statute books. The object of the act was to give the protection which it purports to give. It was not intended to hold out an unenforceable and optional promise.

That the State did not intend to become a party to the Guaranty Fund in its soverign capacity as a State is conclusively shown by the clause of Section 3, immediately following that last above quoted, as follows:

> "Provided, however, that no bank shall be permitted to advertise its deposits as guaranteed by the State of Oklahoma" * * * then follow penalties for violation.

If the State were itself involved in the Depositor's Guaranty Fund, and were the owner of the fund and charged with its administration and disbursement, why should it be so emphatic to prohibit and punish the use of its name as the guarantor? The only answer is that the purpose of the framers of the act was to distinguish between the State itself and the creatures of the State. They provided for the creation of the Depositor's Guaranty Fund and for its proper administration, and then left the matter to those directly interested in it. They provided in emphatic and unmistakable terms that the State itself should not be considered as taking any part in the actual transaction of guaranty.

For aught that appears in this case there may be plenty of money from the failed Farmers and Merchants' Bank in the hands of the State Banking Commissioners to pay the plaintiffs' claim. For aught that appears the refusal to pay the plaintiffs' claim may be purely capricious and without any substantial reason, yet, unless this suit can be sustained the plaintiffs have no remedy in a Court of Justice to recover the amount of their deposit.

It is therefore respectfully submitted that this suit is not against the State of Oklahoma, but is against the officers as individuals to compel them to perform a plain duty imposed upon them by law and, therefore, properly brought in the Federal Court, and that consequently the judgment should be reversed.

Respectfully submitted,

L. D. ROACH,
C. WILFRED CONARD,
Attys. for Appellant.

Opinion of the Court in W. S. Farrish v. State Banking Board on which this case was decided.

CAMPBELL, D. J.:

The Oklahoma Trust Company, one of the defendants in this case, was organized under the laws of Oklahoma, was subject to the banking laws of the state, and its depositors were entitled to the protection against loss afforded by the depositors' guarantee fund. The plaintiff's assignor, The Texas Company, had advanced certain funds to the defendants McNerney and McNerney Company, and furnished certain material used in carrying out certain street paving contracts which McNerney or the McNerney Company had with the City of Muskogee. In order to secure to The Texas Company reimbursement for the funds and material so advanced, McNerney and McNerney Company had assigned to The Texas Company certain paving bonds issued, or to be issued, by the city in payment for such paving. The Oklahoma Trust Company which at the time of said assignment also had some claim against McNerney and the McNerney Company, manifested its consent to the assignment of said bonds by appending its written agreement to said assignment contracts, to the effect that any pledge or lien it might have or might acquire should be subordinate to the rights of The Texas Company under said contracts of assignments, with the further provision that "it hereby contracts with The Texas Company to buy and pay for all bonds issued under said paving contracts at ninety cents on the dollar of their par value, same to be accepted and paid for within five days after they are tendered." Subsequently certain bonds were issued in the city and sold by the Oklahoma Trust Company, the proceeds of which, in the sum of $25,351.63, under the foregoing agreement it was obligated to pay to The Texas Company. Before payment, however, McNerney and the McNerney Company made claim to this fund, denying the right of The Texas Company thereto, and pending the controversy the Oklahoma Trust Company deposited the same in its banking department to its credit as trustee. While this deposit so remained and in the latter part of Decem-

ber, 1909, the Oklahoma Trust Company, which for some time had been in a failing condition, was taken in charge by the state bank commissioner as an insolvent institution, and, on January 3d, 1910, under the direction of the bank commissioner, the said trust company sold its banking business to the defendant Alamo State Bank, the said Alamo State Bank assuming and undertaking to pay on demand most of the deposits of the said Trust Company, but especially excepting therefrom the above-mentioned deposit standing in the name of the trust company as trustee. It is now determined that the fund constituting this deposit should have been paid over by the trust company to The Texas Company, under the above-mentioned contracts, and that it might justly and equitably be treated and considered as a deposit of The Texas Company, and The Texas Company a depositor with the trust company, as contemplated in the depositors' guaranty fund legislation herein referred to.

Another amount involved is the sum of $21,252.40, which was deposited to the credit of the Trust Company with the Hamilton National Bank of Chicago. This fund originated from a sale of paving bonds by one Merrell Moores, acting for the Trust Company. The proceeds of these bonds under the terms of the contracts above-mentioned also belonged to The Texas Company; but in violation of an injunction of this court, the Trust Company caused to be applied to the payment of certain of McNerney's notes, which it held, the sum of $21,252.40 out of such proceeds, which sum it deposited to its own credit, as above stated, on December 31, 1909. When on January 3, 1910, it sold its banking business to the Alamo Bank, this credit was one of the assets transferred, and $18,823.12 of this credit was applied by the Alamo Bank to the payment of an indebtedness of the Trust Company, due the Chicago bank, which the Alamo Bank had assumed, and to secure which certain notes of the Trust Company had been pledged to the Chicago bank. These notes, subject to the lien of the bank, had also been included in the transfer to the Alamo Bank, and, pending payment of the indebtedness to the Chicago bank, these

notes were delivered to the Alamo Bank. The contention of the plaintiff as to this fund is thus stated in counsel's brief:

> "Complainant here insists, (*1*) that, because the bank commissioner, as the representative of the State Banking Board, requested and demanded that the Oklahoma Trust Company transfer its assets to the Alamo State Bank, including in the transfer the $21,252.40 then in the Hamilton National Bank and equitably belonging to the complainant, and because this transfer was the means and plan adopted under the direction of the bank commission to liquidate the affairs and pay the depositors of the Oklahoma Trust Company, the State Banking Board is liable as in tort for the entire amount; (*2*) that even if the transfer and appropriation of this $21,252.40 had not been under the direction of the representative of the State Banking Board the same result would obtain, because this trust fund was used as far as it would go to induce and compensate the Alamo State Bank to pay depositors of the Oklahoma Trust Company to the amount of $448,585.37, which depositors the State Banking Board otherwise would have been compelled to pay, thus subrogating the complainant to the rights of those depositors and entitling him to demand and collect the $21,252.40 from the State Banking Board; and (*3*) that a portion of this indentical fund, namely, the sum of $18,823.12, having been used to discharge a lien on certain specific securities, the complainant is subrogated for that amount to the lien so discharged, and there is no merit in the plea of *bona fide* purchase."

Of the proceeds of the bonds sold by Moores, as above stated, there was the further sum of $20,000 which was applied to the payment of an indebtedness due from the Trust Company to the Commerce Trust Company of Kansas City, by which certain collaterals held by the Commerce Trust Company as security were released and passed to the Alamo State Bank under

the terms of the transfer of January 3d, 1910. Certain of these collaterals are now by agreement of parties impounded in the hands of a custodian, pending the determination of this cause, and the remainder have been disposed of by the Alamo Bank. It is the contention of the complainant that as to these collaterals, his assignor, The Texas Company, was subrogated to the rights of the Commerce Trust Company, as pledgee, and entitled by such subrogation to the possession of these collaterals now in the hands of the custodian, or their proceeds, to apply toward the repayment of the Texas Company's money so wrongfully applied by the Oklahoma Trust Company toward the payment of its indebtedness to the Commerce Trust Company, whereby these collaterals were released by the latter company. The remainder of these collaterals not so impounded, the Alamo bank has realized upon. Plaintiff contends that, inasmuch as the proceeds of such collaterals were either used by the Alamo Bank in payment of depositors of the Trust Company, or formed a part of the consideration for said payment, passing to it from the Trust Company, plaintiff's assignor, The Texas Company, was entitled to the rights of a depositor as against the Alamo Bank and the State Banking Board.

The Alamo State Bank received $20,000 more of the funds realized by the sale of bonds by the Trust Company, a portion of which was placed by the Trust Company to the credit of the Alamo Bank in the Commerce Trust Company of Kansas City, and the remainder first placed to the credit of McNerney and by him used to take up his note held by the Alamo Bank. On August 25th, 1910, when the Alamo Bank closed and its assets were sold by the Bank Commissioner to the Union State Bank, it held on hand $18,012.58 in cash which was turned over to the Union State Bank. As there is no proof that between the date when the Alamo Bank received this $20,000 and August 25th, 1910, its amount of cash was less than $18,012.58, complainant contends that he, as assignee of The Texas Company, is entitled to apply this cash item to his reimbursement by an award against the Union State Bank, and, if any deficiency, or if the entire amount of the cash fund is

not subjected, he have judgment against the State Banking Board, "it having received the benefit of the entire $20,000 received by the Alamo Bank, under the transfer of January 3d, 1910, and operated pro tanto in the assumption and payment of depositors."

Counsel for complainant in his brief says: "Complainant intends to dismiss without prejudice as to the individual defendants who compose the State Banking Board, retaining the board, as a board, and the other defendants." Does the State Banking Board, which is sued in its official capacity, so represent the State of Oklahoma as a mere agency of the state, as that this, while a suit against the board, in which the state is not nominally a party, is in effect a suit against the state, a suit in which the state, so far as the recovery sought against the board is concerned, is the real party in interest? This is the contention made by counsel for the State Banking Board, claiming for the board the immunity against suit afforded by the Eleventh Amendment to the federal constitution. When this question was presented by the demurrer interposed on behalf of the State Banking Board at an earlier stage of this proceeding, the court ruled against the contention that it is in effect a suit against the state, and permitted the case to proceed to final hearing. By agreement of counsel at the close of the taking of testimony by the examiner, the case was submitted upon the record, upon briefs of counsel, without oral argument. In the briefs is again raised the question as to whether it is in effect a suit against the state, and the question has been very fully briefed by counsel upon both sides.

By section 1 of Art. XIV of the Oklahoma Constitution it is provided that the legislature shall enact general laws providing for the creation of a banking department to be under the control of a bank commissioner appointed by the governor by and with the consent of the senate, with sufficient power and authority to regulate and control all state banks, etc., under laws which shall provide for the protection of depositors and individual stockholders. Pursuant to this provision, the legislature has provided for a state banking

board. By amendment of the original act, the personnel of the board has been changed, but its powers and duties are not affected so far as relates to this enquiry. It is provided that "said board shall have supervision and control of the depositors' guaranty fund * * * and shall have power to adopt all suitable rules and regulations, not inconsistent with law, for the management and administration of the same." The guaranty fund is raised by an assessment from time to time of a certain per cent of average daily deposits upon the several state banks and trust companies organized under the banking laws of the state, and, in addition, certain emergency assessments when occasion may require. It is further provided that if the amount realized from such emergency assessments shall be insufficient to pay all the depositors of all failed banks having claims against the guaranty fund, the said banking board shall issue and deliver to such depositors interest bearing certificates of indebtedness, consecutively numbered, payable upon call of the State Banking Board, as state warrants are paid by the state treasurer, in the order of their issue, out of the emergency levy therefor made. It is further provided that "as rapidly as the assets of failed banks are liquidated, and realized upon by the bank commissioner, the same shall be applied, first, after the payment of the expenses of liquidation, to the repayment to the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed banks, and shall be applied by the State Banking Board toward refunding any emergency assessments levied by reason of the failure of such liquidated bank." Provision is also made for the appointment of a bank commissioner, and it is further provided that whenever the bank commissioner shall become satisfied of the insolvency of a state bank or trust company, he may, after due examination of its affairs, take possession of such bank and its assets, and proceed to wind up its affairs. It is further provided that in the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full,

and when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the State Banking Board shall draw from the depositors' guaranty fund * * * the amount necessary to make up the deficiency, and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company, and against all other persons, corporations or firms. Such liability may be enforced by the state for the benefit of the depositors' guaranty fund.

In *Noble State Bank* v. *Haskell*, 219 U. S. 109, this act is summarized as follows:

> "This act creates the Board and directs it to levy upon every bank existing under the laws of the State an assessment of one per cent of the bank's daily average deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be five per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the Bank Commissioner, if its cash immediately available is not enough to pay depositors in full, the Banking Board is to draw from the Depositors' Guaranty Fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund."

In the case last cited, the Supreme Court holds that this legislation is an exercise, and a proper exercise, of the police power of the state, and the court says:

> "If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object

of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke, to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand."

It is seen, therefore, that the act is an exercise of the police power of the state, and has for its accomplishment the purpose and policy of the state, as evidenced by the legislation, "to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand." In effectuating this purpose and policy the bank commissioner and State Banking Board are but the agents of the state. In fact, that is the only way that the state, as a political corporate body, can act. *In re Ayres*, 123 U. S. 501. The protection of depositors contemplated by the act is a protection extended by the state, as we have seen, in the proper exercise of the police power. In order to effect this protection a fund, known as the guaranty fund, is raised by assessing state bank institutions. This fund does not pass to the state treasurer, as do most other state funds, but is subject to the supervision and control of the State Banking Board. In relation to this fund, the Supreme Court of Oklahoma, in *State* v. *Cockrell*, 112 Pac. 1000, has said:

> "That the Bank Commissioner is a state officer has not been and cannot be questioned. That the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund is also true. The depositors' guaranty fund act was sustained by this court on the theory of the reserve power of the state to alter and amend charters of state banking corporations for the public welfare of the people of the state. * * * This power exercised for the

public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this state * * * equal to five per centum of its average daily deposits during its continuance in business as a banking corporation,' for the purpose of protecting the depositors of such banks (section 3, article 2, c. 5, pp. 121-123, Sess. Laws, 1909), is the same as that which levies, or causes to be levied, a tax upon the people and property within the state for the maintenance and support of the common schools and educational institutions. The title of such depositors' guaranty fund vests in the state just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose."

Whether that decision be binding upon this court in this case or not, I think the conclusion sound that the bank guaranty fund in the hands of the State Banking Board is a part of the funds of the state, to be used, it is true, only for the specific purposes for which it is assessed, and that the board's payment from this fund to depositors of failed banks is in effect the state making such payments. The theory upon which complainant seeks to recover from the State Banking Board is that as to a part of the recovery sought; The Texas Company was a depositor of the Oklahoma Trust Company, and entitled to demand payment as such from the State Banking Board, the Trust Company having become insolvent and the Bank Commissioner having taken it in charge for that reason and brought about the transfer to the Alamo bank. As to the remainder of the recovery sought, the theory is that because funds belonging to The Texas Company and not the Trust Company, were under the direction of the Bank Commissioner transferred to the Alamo Bank, and used by it in the payment of certain depositors of the Trust Company, who but for payment by the use of such funds would have been entitled to demand payment from the Bank-

ing Board, therefore, the plaintiff, who has succeeded to the rights of The Texas Company, is subrogated to the rights of such depositors to demand payment from the State Banking Board.

This presents the question whether a depositor of an insolvent bank, of which the bank commissioner has taken charge, and the cash assets of which are insufficient to pay depositors, can maintain an action in this court against the Banking Board to enforce the payment of his deposit from the bank guaranty fund. If in such a suit the state, though not nominally a party, is a real party in interest as defendant, then it must follow that the case falls within the prohibition of the Eleventh Amendment. *In re Ayres*, 123 U. S. 505. In *Pennoyer* v. *McConnaughty*, 140 U. S. 1, where many former cases of the Supreme Court relative to this question are reviewed, it is said:

> "The question, then, of jurisdiction is first presented for determination. Is this suit in legal effect one against the state, within the meaning of the Eleventh Amendment to the Constitution? A very large number of cases involving a variety of questions arising under this amendment have been before this court for adjudication, and as might naturally be expected in view of the important interests and the wide-reaching political relation involved, the dissenting opinions have been numerous. Still the general principles enunciated by the adjudications will, upon a review of the whole, be found to be such as the majority of the court and the dissentients are substantially agreed upon.
>
> It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state without its consent, even though the sole object of such suit be to bring the state within the operation of the Constitutional provision, which provides that: 'No state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of

the court. Accordingly, it is equally well settled that a suit against the officers of a state to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against the state itself.

In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

The first class is where the suit is brought against the officers of the state as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. *In re Ayres*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*, 107 U. S. 769; *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52.

The other class is where a suit is brought against defendants, who claiming to act as officers of the state and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or form compensation in damages, or in a proper case where the remedy at law is inadequate, for an action to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial,—is not, within the meaning of the Eleventh Amendment, an action against the state. *Osborn* v. *Bank of the United States*, 9 Wheaton 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U. S. 773; *Allen* v. *Baltimore & Ohio R. R.*, 114 U. S. 311; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270."

After reviewing a number of decisions of the Supreme Court, in which suits against state officers individually were held not to be in effect suits against the state, it is further said in this case:

> "The dividing line between the cases to which we have referred and the class of cases in which it has been held that the state is a party defendant, and, therefore, not suable by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham* v. *Macon & Brunswick R. R.*, where it was said, referring to the case of *Davis* v. *Gray, supra:* 'Nor was there in that case any affirmative relief granted by ordering the Governor and Land Commissioner to perform any act towards perfecting the title of the company.' 109 U. S. 453-454. Thus holding, by implication at least, that affirmative relief would not be granted against a state officer by ordering him to do and perform acts forbidden by the law of a state, even though such law might be unconstitutional.
>
> The same distinction was pointed out in *Hagood* v. *Southern,* which was held to be in effect a suit against the state, and it was said: 'A broad line of demarkation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law, or suits in equity are maintained against defendants, who, while claiming to act as officers of the state, violate and invade the personal property rights of the plaintiffs under color of authority unconstitutional and void.' 117 U. S. 52-70."

Referring to *In re Ayres,* 123 U. S. 443, which is reviewed, it is further said in relation to that case:

> "In delivering the opinion of the court, Mr. Justice Matthews, referring to the class of cases in which it had been adjudged that the suit was

against state officers in their private capacity, and not against the state, said:

'The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. * * * This feature will be found on an examination to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a state or of the United States, where the objection has been interposed that the state was the real defendant, and has been overruled'." 123 U. S. 500-501.

In *Smith* v. *Reeves*, 178 U. S. 436, the receivers of a railway company sued the defendant as treasurer of the State of California, in the Circuit Court for the Northern District of that state, to recover certain taxes, which it was alleged had been illegally assessed against the railway company, and which had been theretofore paid. The state law provided that any person who, having paid his taxes, was dissatisfied with the assessment, might, subject to certain conditions, bring an action against the state treasurer for the recovery of the amount of taxes so claimed to have been illegally assessed, subject to the right of the treasurer, if suit was brought in some other court, to demand that the action be tried in the superior court of the County of Sacramento. Provision was made for payment of any judgment obtained in such suit, etc. It was held in the case that the provision of the state law authorizing suit against the treasurer amounted only to consent on the part of the state that such suit might be brought in the state courts, and did not amount to consent to such suits in any United States court. The point was made in this case that it was in effect a suit against the state, and as to this the court said:

"Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the

state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against the officer in his official capacity; and the judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal* v. *Wesley,* 167 U. S. 204, 221, and authorities there cited. In the present case, the action is not to recover specific moneys in the hands of the state treasurer, or to compel him to perform a plain ministerial duty; it is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act, to the injury of the plaintiffs in their persons or property; but one to compel the state, through its officers, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

"The case in some material aspects is like that of *Louisiana* v. *Jumel,* 107 U. S. 711. That was a proceeding by mandamus against officers of Louisiana, to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the state, but which it subsequently refused to recognize as valid obligations, and

directed its officers not to pay. The court says: 'It may be without doubt easily ascertained from the accounts how much of the money on hand is applicable to the payment of these debts; but the law nowhere requires the setting aside of this fund, any more than others, from the common stock. In the treasury all funds are mingled together and kept so until called for to meet specific demands. The remedy sought in order to be complete would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place. When a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done, and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

"We are clearly of opinion that within the meaning of the constitutional provisions, relating to actions instituted by private persons against a state, this suit, though in form against an officer of the state, is against the state itself. *In re Ayres*, 123 U. S. 443; *Pennoyer* v. *McConnaughty*, 140 U. S. 1-10."

In *Louisiana* v. *Jumel, supra,* it is said:

"The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax-collectors and paid over to him, that is to say, into the state treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the state. If there is any trust, the state is the trustee, and unless the state can be sued, the trustee cannot be enjoined. The officers owe duty to the state alone, and have no contract relations with the bondholders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the state, but not the state through them.

"In this connection there is much that is instructive in *Reg.* v. *Lords Commissioners of the Treasury,* Law Rep. 7 Q. B. 387. There money had been appropriated by Parliament for the payment of costs of a particular character, and an application was made for a mandamus to compel the Lords Commissioners of the Treasury to pay certain bills which had been properly taxed; but although the court was emphatic in its declaration that payment ought to be made, the writ was refused because the Lords Commissioners held 'the money as the servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable.' Lord Chief Justice Cockburn, in his opinion, said (p. 394): 'Though I quite agree that according to the appropriation act they (the Lords Commissioners) were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills,

still I cannot say that there is any duty which makes it incumbent upon them to do what I cannot hesitate to say they ought to have done, except as servants of the Crown; because in that character they have received the money, and in no other.' And Blackburn, J. (p. 399): 'It seems to me that the obligation, such as it is, is upon Her Majesty, to be discharged through her servants, and you cannot proceed therefor against the servants.' So, here, the obligation is all on the state, to be discharged through its servants, and the money is held by the officers proceeded against in their character as servants of the state, and no other."

In *Murray* v. *Wilson Distilling Company*, 92 C. C. A. 1, it is said:

"Undoubtedly the Eleventh Amendment was intended to prevent a federal court in suits prosecuted by citizens of another state or subjects of a foreign state from interfering with a state in the preservation of its autonomy in maintaining its own system of self-government so long as such system is in harmony with the Constitution of the United States. To this end, therefore, the funds of the state in its treasury, or held by its officers or agents, for use in the administration of the governmental affairs of the state, are not to be affected by the process of the federal court, nor can such court entertain jurisdiction of an action which has for its purpose an investigation of the right of the state to manage and control its internal affairs; or of an action which will obstruct the state authority or impair the state instrumentalities in the discharge of legitimate functions in the maintenance of the state's integrity. To be more concise: The exceptional inhibition is to the effect that the courts of the United States cannot entertain jurisdiction in an action at the instance of a citizen, first, which seeks to recover against the state the property belonging to the state, or the purpose of which is and the result of which would be to disturb the legal and orderly administration of the state's

internal and governmental affairs by its bonded officers and agents."

In this case, involving a state of facts somewhat analagous to the case at bar, the Circuit Court of Appeals, for the Fourth Circuit, held that the suit against the Commissioners to wind up the State Liquor Dispensary of South Carolina was not in effect a suit against the state, but the Supreme Court reversed this decision, holding the suits to be against the state. *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151.

While on the demurrer I was of a different opinion, after careful consideration of all the authorities presented by counsel for both sides, I am forced to the conclusion that so far as the recovery of a money judgment sought against the Banking Board finally is concerned, it is in effect a suit against the state. The plaintiff seeks a decree adjudging him to have the right of a depositor, such as the bank guaranty fund legislation of the state is designed to protect, fixing the amount of his recovery as such, and compelling the State Banking Board to pay the same out of the bank guaranty fund, and, if necessary, to make special assessments against the several state banks. If, as I conclude, the Bank Guaranty Fund is a fund belonging to the state, in the custody and control of which the members of the State Banking Board are merely the agents of the state in disbursing this fund to depositors, thereby representing the state in effectuating its policy and purpose, as evidenced by the bank guaranty legislation, it follows, under the foregoing authorities, that a suit by a depositor against the board to enforce the payment of his deposit in a failed bank out of the bank guaranty funds, is in effect a suit against the state.

Counsel for plaintiff rely strongly on *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390. In that case the state had loaned its credit in the shape of state bonds to a railway company, the company to pay the current interest on the bonds and also principal when due. Later, by act of the legislature, the railway company was authorized to issue its own bonds, and pay the proceeds thereof into the state treasury, sufficient to cover the amount for which the state was obligated

upon such outstanding state bonds. Upon making such payment it was made the duty of the governor to make over, assign and convey to the trustees in the mortgage securing the railway company's bonds, the statutory lien of the state arising out of its issuance of its bonds in the first instance. This was a suit by the trustees, alleging that on behalf of the railway company they had paid the state treasurer the full amount for which the state was obligated upon its bonds, and seeking to enjoin the sale of the railroads' property in satisfaction of the lien claimed by the state, and to enforce the assignment to them by the governor of the state statutory lien. The point was made by the defendant that this was a suit against the state, but the court holds against this contention.

I find it difficult to entirely harmonize the above case with earlier and later decisions of the Supreme Court on the point involved, but in view of authorities heretofore cited, I cannot find in that case authority for holding in the present case that the recovery urged against the Banking Board is against them as officers and not against the state. As I view this case, it represents a situation more nearly analagous to *Murray* v. *Wilson Distilling Co.*, and *Smith* v. *Reeves, supra.* In the case of *Huidekoper* v. *Hadley*, 171 Fed. 1, also relied upon by plaintiff, there was involved the question as to whether a suit against the Board of Equalization of the State of Missouri to enforce by mandamus the discharge of a plain official duty with regard to equalizing the valuation of property of the state for taxing purposes was in fact a suit against the state. And it was held not to be such. But the present case, in my judgment, involves more than that.

What has been said heretofore has relation only to the question of the right of the complainant to recover from the State Banking Board in virtue of the status of The Texas Company as a depositor, either directly or by right of subrogation. When we come to the question of the plaintiff's right to the impounded collaterals, now constructively in the possession of the court, or the cash item held by the Union State Bank, a different case is presented. The fact that the state may claim a

lien upon that does not divest the court of jurisdiction to determine the rights of the contending parties, and enter decree accordingly. *Cunningham* v. *Macon R. R.*, 109 U. S. 446.

Taking first the $21,252.40 realized by the Oklahoma Trust Company from the sale of bonds and which it deposited in The Hamilton National Bank of Chicago on December 21, 1909. This fund belonged to The Texas Company under the assignments from McNerney and McNerney Company, ratified by the Trust Company. It should have been paid to The Texas Company, or its assignee, the plaintiff, and its deposit by the Trust Company to its credit with The Hamilton National Bank was in direct violation of the court's order. In the hands of The Hamilton National Bank it still remained the fund of The Texas Company or its assignee. It is, however, contended that the Alamo Bank was an innocent purchaser, in good faith, for value and without notice, of this fund. But this defense is not supported by the proof. It does not appear from the evidence that at the time of the transfer of assets of the Trust Company to the Alamo Bank, on January 3, 1910, the Alamo Bank did *not* have notice of the interest of The Texas Company or the plaintiff in this fund. It further appears that in February, 1910, long before the Alamo Bank had completed paying the depositors of the Trust Company (and this was the consideration for the transfer to it of the Trust Company's assets), the plaintiff notified the Alamo Bank of his interest in this fund. Now with such knowledge of the interest of the plaintiff in this fund, a portion of it was applied to the payment of $50,000 originally due from the Trust Company to The Hamilton National Bank and later assumed by the Alamo Bank. It appears in proof that the lowest daily credit balance in the Hamilton Bank in favor of the Alamo Bank, between January 3d, 1910, and April 18th, 1910, when this indebtedness was paid, was $16,530.98 on February 12th, and this credit balance was used, so far as it would go, toward paying the $50,000. It follows that at least $16,530.98 of the plaintiff's money was used in this payment, which operated to release the collaterals held by The Hamil-

ton Bank and now in dispute. Thereby the plaintiff was subrogated to the rights of The Hamilton Bank as pledgee of this collateral, to the extent of this $16,530.98. If the state ever acquired any lien on this collateral as a part of the assets of either the Trust Company or the Alamo Bank, its lien did not attach until long after it had been pledged as above stated and while it was so pledged, and the rights of the pledgee are obviously paramount to any the state might have acquired. It follows that the complainant, as successor in interest to The Texas Company, is entitled to the possession of such of this collateral, or the proceeds thereof, as is now in the hands of DeRoos Bailey, trustee, to be applied to the satisfaction of his claim against the Trust Company, to the extent of $16,530.98, unless it be the three notes claimed by the Union State Bank, and that bank's contention will be considered further on.

Of the proceeds of the bonds sold by Moores, as heretofore stated, $20,000 was paid to the Commerce Trust Company, of Kansas City, and applied to an indebtedness of the Oklahoma Trust Company therefor which there was pledged certain collateral. By the payment of this indebtedness, this collateral was released. To the extent of $20,000, the plaintiff was subrogated to the rights of the Commerce Trust Company, as pledgee of this collateral. Neither was the Alamo Bank an innocent purchaser of this collateral. Nor does the fact that pursuant to the state banking laws a part of this collateral was sold under order of court, to the Union State Bank, eliminate the question as to whether the Union State Bank was an innocent purchaser for value without notice. The court order contemplates a sale of the Alamo Bank's assets. If included in that property there are items upon which third persons have a valid lien or claim of any character, the order could not have the effect of divesting that. The assets are sold as they are, and the title which the purchaser acquires is determined by the same rules as if it had been a voluntary transaction, without the intervention of the court order. The consideration passing from the Union State Bank for the purchase of the assets of the Alamo Bank, including the collaterals

and the fund in controversy, was its promise to pay the deposits of the Alamo Bank. But within just a few weeks after this transfer was made, and long before the deposits had been paid in full, the Union State Bank had explicit and positive notice of the complainant's claim, as evidenced by the agreement under which the custodian took charge of the collateral and the bonds which the Union State Bank executed as to the cash fund. The defense of innocent purchaser is an affirmative defense. It must appear that the purchase was in good faith, for a valuable consideration, and that the consideration was paid before notice of plaintiff's claim. *Johnson* v. *Ga. Loan & Trust Co.*, 141 Fed. 593, and authorities cited; 35 Cyc. 345, *et seq.*, 24 Am. & Eng. Enc. 1171. Under these authorities, the Union State Bank has not made out a case of bona fide purchaser, even if that defense is permissible as against the plaintiff in this case.

But a bona fide purchaser is not protected as against the claim of the true owner, where the seller has obtained possession of the property by wrongful acts, if without any delivery by or consent on the part of the owner. 35 Cyc. 361. The plaintiff was entitled to the proceeds of the bonds sold by Moores. Equitably these funds, less a small commission and expense, belonged to the plaintiff. By order of this court, McNerney and the Oklahoma Trust Company had been enjoined from commingling or confusing these funds with any other funds, and required to keep them separate and apart, "so that no creditor of said Oklahoma Trust Company, other than the plaintiff and others interested in said bonds, will have any claim thereon." Disregarding this order, and with no more right to do so than if they had stolen them, McNerney and the representatives of the Trust Company, in flagrant violation of this injunction, proceeded to treat these funds as their own and so dispose of them as to defeat, if possible, the complainant's claim to them. They passed from plaintiff's control by no act of his, but in spite of the utmost vigilance to hold them. He has a right to follow these funds, or their fruits, so long as they may be traced and identified.

Besides the collateral referred to, the Alamo Bank received $20,000 of the proceeds of these bonds, in payment on certain of McNerney's notes which it held. This was also a part of the proceeds of the bonds wrongfully disposed of by the Trust Company. When the transfer of the assets of the Alamo Bank was made to the Union Bank, it included an item of $18,018.58 cash then on hand. It does not appear that at any time between the receipt of the said $20,000 and the date of the transfer to the Union State Bank, the cash in the Alamo Bank was less than the said amount on hand at the time of said transfer. A careful reading of the record convinces that when it received this fund, the Alamo Bank, through its officers, had notice or information sufficient to put it upon enquiry, which, if reasonably exercised, would have apprised it of the fact that this money equitably belonged to the plaintiff. It cannot be said to have come in possession of this fund as a bona fide purchaser for value without notice. In the absence of evidence to the contrary, the presumption is that the $18,018.58, turned over to the Union Bank, was a part of this fund. *National Bank* v. *Insurance Co.*, 104 U. S. 54. The funds being traced to the Union State Bank, which, for the reasons already stated, cannot be deemed an innocent purchaser thereof, complainant is entitled to recover this fund also. Decree may enter denying relief as against the State Bank Commissioner and Banking Board, but awarding the complainant the possession of the collaterals, or the proceeds, now in the hands of the custodian, and against the Union State Bank, for the sum of $18,018.58.

RALPH E. CAMPBELL, *Judge.*

EXCERPT FROM THE BANKING ACT OF OKLAHOMA.

ARTICLE II.

Section 1. The Banking Board shall be composed of the Governor and two members to be appointed by the Governor, by and with the advice and consent of the Senate. The members so appointed shall receive as their compensation the sum of Six Dollars ($6) per day for the time actually in session and necessarily used in going to and returning from the place where the sessions are held, together with their necessary traveling expenses, including hotel bills, and shall be paid from the same fund as the Bank Commissioner is paid. The Bank Commissioner shall be ex-officio Secretary of the Board. Said Board shall have the supervision of the depositors' guaranty fund, hereinafter provided for, and shall have power to adopt all rules and regulations, not inconsistent with law, for the management and administration of the same.

Section 2. The Bank Commissioner's salary shall be Four Thousand Dollars per annum and traveling expenses. There are thereby created and established twelve positions, each position to be known as an assistant to the Bank Commissioner, each of whom shall have had at least three years' practical experience in actual banking, one of whom shall be designated as the Building and Loan Auditor, to be filled by appointment by the Bank Commissioner, subject to the approval of the Governor; and the salary of each said assistant to the Bank Commissioner shall be Two Thousand ($2,000) Dollars per annum and traveling expenses, payable monthly; provided, that no person shall be appointed assistant who is interested in any bank, nor shall any person become interested in any bank while holding such position.

Section 3. There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this state, for the purpose of creating a Depositors'

Guaranty Fund, equal to five per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessment shall be payable one-fifth during the first year of existence of said bank or trust company, and one-twentieth during each year thereafter until the total amount of said five per centum assessment shall have been fully paid. Provided, however, that the regular assessment heretofore levied and paid by banking corporations or trust companies now existing, shall be deducted from and credited on said five per centum assessment hereby levied. The average daily deposits of each bank during the preceding year prior to the passage and approval of this act, shall be taken as the basis for computing the amount of the first payment on the levy hereby made. One year after the passage and approval of this act, and annually thereafter, each bank and trust company, doing business under the laws of this state, shall report to the Bank Commissioner the amount of its average deposits for the preceding year, and if such deposits are in excess of the amount upon which the first or subsequent payment of the levy hereby made is computed, each bank and trust company, having such increased deposits, shall immediately pay into the depositors' guaranty fund a sum sufficient to pay any deficiency on said first or subsequent payment, as shown by such increased deposits, by giving credit to the depositors' guaranty fund and issuing a special certificate of deposit, payable to the Bank Commissioner, bearing four per centum interest per annum. After the five per centum assessment, hereby levied, shall have been fully paid, no additional assessment shall be levied or collected against the capital stock of any bank or trust company, except emergency assessments, hereinafter provided for, to pay the depositors of failed banks, and except assessments that may be necessary by reason of increased deposits to maintain such funds at five per centum of the aggregate of all deposits in such banks and trust companies, doing business under the laws of this state; provided, that no corporation doing a trust business shall have the benefits of this act after September 1st, 1911. Whenever the depositors' fund shall become impaired

or be reduced below said five per centum by reason of payments to depositors of failed banks, the State Banking Board shall have the power and it shall be its duty to levy emergency assessments against capital stock of each bank and trust company doing business in this state to restore said impairment or reduction; but the aggregate of such emergency assessment shall not, in any one calendar year, exceed two per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said depositors' guaranty fund, the State Banking Board shall issue and deliver to each depositor, having such unpaid deposits, a certificate of indebtedness for his unpaid deposit, bearing six per centum interest. Such certificate shall be consecutively numbered and shall be payable, upon the call of the State Banking Board, in like manner as State Warrants are paid by the State Treasurer in the order of their issue, out of the emergency levy thereafter made; and the State Banking Board shall from year to year levy emergency assessments, as hereinbefore provided, against the capital stock of all the banking corporations and trust companies doing business in this State, until such certificates of indebtedness, with the accrued interest thereon, shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the same shall be applied first, after payment of the expenses of liquidation, to the repayment of the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the State Banking Board toward refunding any emergency assessment levied by reason of the failure of such liquidated bank. Provided, that the Guaranty Fund collected under this act, shall be redeposited with the bank from which it was paid and a special certificate of deposit shall be issued to the Bank Commissioner by each and every bank and trust company, bearing four per centum interest per annum.

Section 4. Banks and trust companies organized subsequent to the enactment of this act shall pay into

the Depositors' Guaranty Fund three per cent of the amount of their capital stock when they open for business, which amount shall constitute a credit fund, subject to adjustment on the basis of its deposits as provided for other banks and trust companies now existing at the end of one year: Provided, however, said three per cent payment shall not be required of new banks and trust companies formed by the reorganization or consolidation of banks and trust companies that have previously complied with the terms of this act.

Section 5. Whenever any bank or trust company organized or existing under the laws of this state shall voluntarily place itself in the hands of the Bank Commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this state shall have been adjudged to be forfeited, or whenever the Bank Commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors.

Section 6. In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the Depositors' Guaranty Fund and from additional assessments, if required, as provided in Section 2, the amount necessary to make up the deficiency, and the state shall have for the benefit of the Depositors' Guaranty Fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities

may be enforced by the state for the benefit of the Depositors' Guaranty Fund.

Section 7. The Bank Commissioner shall take possession of the books, records and assets of every description of such bank or trust company, collect debts, dues and claims belonging to it, and upon order of the District Court, or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank or trust company upon such terms as the court or judge thereof may direct, and may, if necessary, pay the debts of such bank or trust company, and enforce the liabilities of the stockholders, officers and directors: Provided, however, that bad or doubtful debts as used in this section shall not include the liability of stockholders, officers or directors.

Section 8. The Bank Commissioner shall deliver to each bank or trust company that has complied with the provisions of this act, a certificate, stating that said bank or trust company has complied with the laws of this state for the protection of bank depositors, and that safety to its depositors is guaranteed by the Depositors' Guaranty Fund of the state of Oklahoma. Such certificate shall be conspicuously displayed in its place of business, and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the Depositors' Guaranty Fund of the state of Oklahoma. Provided, however, that hereafter all banks operating under the guaranty law of the state of Oklahoma shall be permitted to advertise that their deposits are guaranteed by the Depositors' Guaranty Fund, but that no bank shall be permitted to advertise its deposits as guaranteed by the state of Oklahoma, and any bank or bank officer or employee who shall advertise their deposits as guaranteed by the state of Oklahoma shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding Five Hundred ($500.00) Dollars or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment, in the discretion of the trial court.

Section 9. After the Bank Commissioner shall have taken possession of any bank or trust company which is subject to the provisions of this act, the stockholders thereof may repair its credit, restore or substitute its reserves and otherwise place it in condition so that it is qualified to do a general banking business as before it was taken possession of by the Bank Commissioner; but such bank shall not be permitted to reopen its business until the Bank Commissioner, after a careful investigation of its affairs, is of the opinion that its stockholders have complied with the laws, that the bank's credit and funds are in all respects repaired, and all advances, if any, made from the Depositors' Guaranty Fund fully repaid, its reserve restored or sufficiently substituted, and that it should be permitted again to reopen for business; whereupon said Bank Commissioner is authorized to issue written permission for reopening of said bank in the same manner as permission to do business is granted after the incorporation thereof, and thereupon said bank may be reopened to do a general banking business.

Section 10. Any bank or trust company which has complied with the provisions of this act shall be eligible to act as a depository of state funds, or any fund under the control of the state or any officer thereof, upon compliance with the laws of this state relating to the deposits of public funds.

AMENDMENT OF MARCH 6, 1913, TO THE STATE BANKING ACTS.

Section 6. That Section 3, of said Act of the Legislature approved February 25, 1911, and entitled: "An Act to amend Section 1 of Article II of Chapter 6, Session Laws of 1909," etc., be and the same is hereby amended to read as follows, to-wit:

Section 3. There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this State an annual assessment equal to one-fifth of one per cent, and no more, of its average daily deposits during its continuance as a banking corporation, for the purpose of creating a Depositors' Guaranty Fund; provided, that the State Banking Board, in their discretion, may levy an additional special assessment of one-fifth of one per centum as provided herein, during the fiscal years ending June 30, 1914; June 30, 1915, and June 30, 1916. Such fund so created shall be known as the Depositors' Guaranty Fund of the State of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this Act.

The assessment for the year 1913 shall be payable immediately after this Act takes effect, and thereafter the annual assessment shall become due and payable on the eleventh day of March of each year, and all assessments shall be computed on the average daily deposits for the preceding year. Such assessments shall be paid by Cashier's Checks, which checks shall be held by the Banking Board until in its judgment it is necessary to collect the same, but such checks shall not bear interest during the time they are so held.

It shall be the duty of the Banking Board to keep an accurate account of the condition of the Depositors' Guaranty Fund, showing all collections from assessments and assets of failed banks, and from all other sources, together with the disbursements of said fund and the certificates of indebtedness outstanding, or other obligations chargeable against the same, and to send each bank operating under the laws of this State

a quarterly financial statement showing the exact condition of the Depositors' Guaranty Fund.

When the Depositors' Guaranty Fund shall amount to as much as two per cent of the average daily deposits of the State Banks, computing upon the last preceding annual statements of such average deposits of said State Banks, over and above all certificates of indebtedness, or other obligations chargeable against the same, the annual assessment herein provided for shall cease, and thereafter it shall be the duty of the State Banking Board to keep and maintain said Depositors' Guaranty Fund to the amount of two per cent of such average daily deposits by making from time to time assessments against the capital stock of State Banks operating under the banking laws of this State, but such assessments shall not exceed one-fifth of one per cent of the average daily deposits of any bank in any year, except as otherwise herein provided, during the fiscal years ending June 30, 1914; June 30, 1915, and June 30, 1916; and authority to make such assessments is hereby expressly conferred upon the said State Banking Board, and said Board shall have authority to make all necessary rules and regulations not inconsistent with the laws of this State for the purpose of collecting and equalizing the assessments and the amount paid thereon among the banks operating under the banking laws of this State.

If at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma," in order to liquidate the deposits of failed banks, or any other indebtedness properly chargeable against said Depositors' Guaranty Fund.

Depositors' Guaranty Fund Warrants of the State of Oklahoma shall bear six per cent interest from date of issue, payable annually, and shall be issued in such form as may be prescribed by the Banking Board, and shall constitute a charge and first lien upon the Depositors' Guaranty Fund when collected, as well as a first lien against the capital stock, surplus and undivided

profits of each and every bank operating under the banking laws of the State of Oklahoma, to the extent of liability of any such bank to the Depositors' Guaranty Fund under the provisions of this Act, and said Banking Board shall have authority to negotiate or otherwise dispose of such Depositors' Guaranty Fund Warrants, at not less than par value, in such manner as it may see fit, to facilitate the liquidation of failed banks.

All warrants heretofore issued by the Banking Board shall be paid serially in the order of their issuance from any funds on hand when this Act takes effect or provided for by the terms of this Act, and all warrants hereafter issued shall be in numerical order and retired in like order.

As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner the proceeds thereof, after deducting the expenses of liquidation, shall be paid to the State Banking Board, and by said Board credited to the Depositors' Guaranty Fund.

Quarterly, and on the dates provided for financial statement in this Act, or oftener if deemed advisable, the Banking Board shall call for payment such outstanding warrants, if any, as can be liquidated from the available funds on hand.

No corporation doing a trust business shall be liable for assessments to create or maintain the Depositors' Guaranty Fund, nor participate in the protection thereof in any manner whatsoever.